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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LLOYD MARINO, Plaintiff and Appellant, v. PRO SPORTS & ENTERTAINMENT, INC., et al., Defendants and Respondents.	B208065 (Los Angeles County Super. Ct. No. BC348109)

APPEAL from an order of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Henry J. Josefsberg for Plaintiff and Appellant Lloyd Marino.

TroyGould and Christopher A. Lilly for Defendants and Respondents Pro Sports & Entertainment, Inc. and Paul H. Feller.

Lloyd Marino appeals from the trial court's order granting the motion of Pro Sports & Entertainment, Inc. (Pro Sports) and Paul H. Feller, pursuant to Code of Civil Procedure section 473, subdivision (d),[1] to vacate the default and default judgment entered against them in favor of Marino. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Feller, the president and chief executive officer of Pro Sports, hired Marino in August 2005 for the position of chief technology officer and vice president of business development at an annual base salary of $150,000. Marino's employment agreement with Pro Sports contained a provision that, in the event of his resignation for "good reason," a term that was specifically defined in the contract, Marino would receive "'[t]he sum of the unpaid portion of the Base Salaries, computed on a pro rata basis through March 15, 2008 . . . plus the sum of the unpaid portion of any bonuses earned pursuant to Section 3(b), computed on a pro rata basis, with respect to the period prior to termination.'" Marino resigned this position two months after he began because Pro Sports twice paid him with checks that failed to clear the bank when he first attempted to deposit them and, as he alleges, underpaid him by $5,769.23.

Marino retained Henry Josefsberg as counsel, and Josefsberg mailed demand letters to Feller at the Pro Sports Los Angeles office in December 2005 and January 2006. Both letters were returned as undeliverable. Letters mailed at the same time to Feller's home address in Carpinteria were not returned. On February 8, 2006, utilizing Pro Sports letterhead reflecting the Los Angeles address Josefsberg had used, Feller responded to the January 2006 demand letter by asserting Marino's claims were meritless.

On February 27, 2006 Marino filed a complaint against Pro Sports and Feller seeking $363,519.23 in damages based on Pro Sports' breach of his employment agreement.[2] On March 4, 2006 Josefsberg mailed a form notice and acknowledgement of

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[1] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] The complaint contained four causes of action: breach of contract against Pro Sports only and claims for wages owed, conversion and unfair business practices against Pro Sports and Feller.

receipt of service for each defendant to both the Los Angeles and Carpinteria addresses. He received no response to the requests although the documents were not returned as undeliverable. On March 7, 2006, still not having served the complaint, Josefsberg sent Feller a letter outlining Marino's claims (but not including a copy of the complaint or informing Feller a complaint had been filed) and notifying Pro Sports of his intent to seek penalties under the Labor Code. On March 15, 2006 Feller signed the certified return receipt for the letter, which had been mailed to the Pro Sports office and apparently forwarded to a post office box near Feller's home. Again, Feller failed to respond.

At this point, Josefsberg hired a process server, who attempted to serve the complaint at the Los Angeles office. The process server was told Pro Sports was unknown at that address. The process server then attempted service at Feller's home. The home was gated, and no one responded to the call button; but a neighbor confirmed the home belonged to Feller. On the fourth try, at 7:21 a.m. on April 20, 2006, a gardener gave the process server the code for the locked gate. He entered the enclosed yard of the home, encountered a man he believed to be Feller and served the man with the summons and complaint for Pro Sports as well as Feller individually.[3]

Shortly thereafter, Marino served written discovery at both addresses but received no response. When neither Pro Sports nor Feller responded to the complaint, Marino served requests for entry of default. Two weeks later, on June 16, 2006, Feller left a voicemail message for Josefsberg identifying himself as the CEO of Pro Sports and asking about the notice of default. Feller asked Josefsberg to call him, which Josefsberg did. Josefsberg told Feller the process server had served the summons and complaint at Feller's home. Although Feller acknowledged he lived at the address given, he did not acknowledge service. Josefsberg informed Feller the court had set a status conference for the following Monday (June 19, 2006); Feller stated he would be there, even though his attorney was out of the country.

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[3] The record does not indicate the process server confirmed the man's identity in any way. He described him as a white male, 45 years old, with brown hair and eyes, six feet one inch tall, weighing 190 pounds. Feller does not dispute he fits that description.

Feller failed to appear at the status conference on June 19, 2006. Josefsberg advised the court of the status of service, including Feller's position he had not been served. The clerk entered the defaults of Feller and Pro Sports, and the court set a prove-up hearing on the default for August 3, 2006. Upon his return to the office, Josefsberg received a voicemail message from Feller stating he had been unable to find the courthouse. Josefsberg served notice of the default prove-up hearing to Feller at his home. On July 17, 2006 he served Feller at his home with declarations for the scheduled prove-up hearing, which included copies of the entry of default against Pro Sports and Feller.

Feller also failed to appear at the default prove-up hearing on August 3, 2006. A default judgment was eventually entered by the court on October 26, 2006 and served on both defendants at Feller's home address on May 2, 2007. Meanwhile, although Feller had made no effort to contact Marino or Josefsberg, Josefsberg discovered Pro Sports had submitted a new agent for service of process at a different address to the Secretary of State.[4] Josefsberg served Pro Sports' new agent and Feller by mail with orders to appear for a debtor's examination set for July 23, 2007. No one appeared. Josefsberg served a second order to appear at a debtor's examination for September 12, 2007 and arranged for it to be personally served on Pro Sports' new agent for service of process.

Service of the second order to appear finally yielded a response. On September 12, 2007 Pro Sports and Feller jointly filed a motion to set aside the default and default judgment. The motion set forth two grounds: First, the summons and complaint had never been served on Feller (citing §§ 473.5, 473, subd. (d)); and, second, Feller, as a principal of the company, was not liable for the wage and breach of contract claims forming the basis for the damages awarded in the judgment. At the hearing on the motion the trial court issued a tentative ruling in favor of Marino, but was persuaded to

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[4] According to the record, Feller had been listed on the Secretary of State's webpage as Pro Sports' agent for service of process as recently as February 21, 2006. As of May 25, 2007 the website listed Bernie Gurr as the agent for service of process at a different address in Los Angeles.

allow further discovery and briefing on the issue whether service had been properly effected.

The parties developed evidence that was presented to the court over the course of two additional hearings. Although he acknowledged the proof of service correctly identified his home address, Feller and his wife submitted declarations stating Feller had been in Hawaii to celebrate his daughter's birthday on the date he was purportedly served. Feller also produced an invoice from a Maui hotel, a page from an April 2006 credit card invoice reflecting the hotel charge and various expenditures in Hawaii and a Pro Sports expense report reflecting business charges on the trip, as well as miscellaneous receipts related to his family's trip. He also submitted a declaration from his gardener, who asserted he had never given the gate code to anyone, including a process server.

Josefsberg countered by contacting the hotel reservations desk, which informed him Feller had stayed at the hotel in November 2006, but it had no record of his stay during April 2006 (the only Feller who had stayed at the hotel in April 2006 was a David Feller). Josefsberg then spoke with an employee in the hotel's accounting department, who confirmed she had been contacted by Paul Feller about his stay at the hotel and had sent him information reflecting his November 2006 stay at the hotel. She sent a facsimile confirming "we have no record of stay for Mr. Paul Feller for the dates of April 18-22, 2006 in Room #524 at the Fairmont Kea Lani Maui." When the hotel balked at providing a declaration confirming this information, Josefsberg requested, through Feller's counsel, Feller's authorization to seek further information from the hotel. Although Feller's counsel agreed the request was reasonable, the authorization was never received. Instead, Feller submitted a supplemental declaration stating he had been advised by the general manager of the hotel the clerk had made a mistake in telling Josefsberg Feller had not been at the hotel during April. The hotel then declined to provide further information to either party relating to Feller's stay at the hotel.

Confronted with this dramatically conflicting evidence, the trial court changed its tentative ruling to deny the motion and instead granted it. Citing the policy favoring

resolution of cases on their merits,[5] the court found Feller had not been served with the summons and complaint. The court therefore granted the motion under section 473, subdivision (d). Marino filed a timely notice of appeal.

CONTENTIONS

Marino contends the trial court lacked jurisdiction to consider the motion for relief from default and erred as a matter of law in finding Pro Sports and Feller were entitled to relief under section 473, subdivision (d). Marino further contends Feller had actual notice of the lawsuit in time to mount a defense, thus barring relief under section 473.5. In the event the motion was properly granted, he contends, it should have been conditioned on an award of fees to cure the prejudice caused by defendants' delay.

DISCUSSION

1. *Standard of Review*

A motion to vacate a default and set aside a judgment "'"is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal."' [Citations.] The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.) Whether a judgment is void due to improper service is a question of law that we review de novo. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496; accord, *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 862.)

Nonetheless, when a ruling turns on a disputed issue of fact, the trial court's express and implied factual determinations are not disturbed on appeal if supported by substantial evidence. (*Strathvale Holdings v. E.B.H., supra*, 126 Cal.App.4th at p. 1250.) "When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to

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[5] "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.'" (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980.)

whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] [¶] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785; see *Griffith v. San Diego College for Women* (1955) 45 Cal.2d 501, 507-508 ["When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed."]; accord, *Capo for Better Representation v. Kelley* (2008) 158 Cal.App.4th 1455, 1462.)

2. *The Trial Court Did Not Abuse Its Discretion in Granting Defendants Relief From Default*

"Although a trial court has discretion to vacate the entry of a default or subsequent judgment, this discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits." (*Cruz v. Fagor America, Inc., supra,* 146 Cal.App.4th at p. 495; see generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 5:276 et seq., p. 5-67 et seq. (rev. # 1, 2008) [describing various grounds, procedures and time limits applicable to seeking relief from default].) "The proper procedure and time limits vary, depending on the asserted ground for relief." (*Cruz,* at p. 495.)

The trial court granted relief under section 473, subdivision (d), which allows the court "to set aside aside any void judgment or order." Relief was properly granted under this provision.

a. *The trial court's finding Pro Sports and Feller were not served with the summons and complaint is supported by substantial evidence*

As a threshold matter we consider the trial court's factual finding Feller was not the man served at his residence on April 20, 2006. As explained above, we are precluded from reweighing the evidence considered by the court. In light of the affidavits

submitted by Feller and his wife and the documentary evidence supporting Feller's claim he was in Hawaii on April 200, 2006, there was unquestionably substantial evidence in support of the court's conclusion Feller had not been properly served with the complaint. We therefore must assume, notwithstanding the very troubling discrepancies in the record, that Feller was not the man served at his home on April 20, 2006.

b. *The default judgment was void within the meaning of section 473, subdivision (d)*

"Section 473 empowers a trial court to set aside any judgment or order that is void as a matter of law, for example, because the court lacked subject matter jurisdiction, or because the summons and complaint were not properly served, so that the court lacked personal jurisdiction over a defendant, or otherwise because the judgment or order violated a party's due process rights to notice and an opportunity to be heard." (*Brown v. Williams* (2000) 78 Cal.App.4th 182, 186, fn. 4.) "Proper service is a requirement for a court's exercise of personal jurisdiction. [Citation.] An order entered without personal jurisdiction over the defendant is void." (*Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863.)

Because the trial court concluded Feller was not the person served on April 20, 2006, the court lacked personal jurisdiction over the defendants; and the default judgment was void "due to improper service." (§ 473, subd. (d); see also *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544 ["[u]nder section 473, subdivision (d), the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service"]; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 209, pp. 814-815.)

3. *The motion was timely*

Although there is no time limit to attack a judgment void on its face (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 19), a judgment is void on its face only when the record affirmatively shows the court was without jurisdiction to render the judgment. (*Canadian & American Mortgage & Trust Co. v. Clarita Land & Invest. Co.* (1903) 140 Cal. 672, 674; *Rochin v. Pat Johnson Mfg.*

Co. (1998) 67 Cal.App.4th 1228, 1239.) Here, neither Pro Sports nor Feller contests the facial validity of Marino's service of process.[6] Accordingly, although the judgment was void due to improper service, the judgment was not void on its face.

When a judgment is valid on its face but void due to improper service, the deadline for moving for relief under section 473, subdivision (d), is the same as the deadline for moving for relief under section 473.5, subdivision (a), for lack of notice. (*Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1116, 1124.) Section 473.5, subdivision (a), provides: "The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered."

Marino contends the 180-day limit applies to the motion filed by Pro Sports and Feller because he served both defendants with the requests for entry of default and the notice of the default prove-up hearing. In addition, the evidence submitted in support of the default judgment, also served on Pro Sports and Feller, included copies of the filed entries of their defaults.[7] However, none of these documents was a written notice that the default had been entered nor was any of them entitled, "Notice of Entry of Default." It may be that the documents served gave Pro Sports and Feller actual notice a default had been entered in the case, but section 473.5, subdivision (a), clearly states the 180-day deadline is triggered by service "of a written notice that the default . . . has been entered." Simply put, neither a request for entry of a default nor notice of a default prove-up

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[6] Had Feller been the person actually served on April 20, 2006, that service would have also been effective as to Pro Sports. Service on a corporation under California law is effectuated by delivery of summons and complaint to an authorized person on behalf of the corporation. (*Dill v. Berquist Const. Co., Inc.* (1994) 24 Cal.App.4th 1426, 1437.) Service may be made upon "the president, chief executive officer, or other head of the corporation" (§ 416.10, subd. (b)), the position held by Feller.

[7] Although the default judgment was entered on October 26, 2006, well more than 180 days before Pro Sports and Feller filed their motion for relief from default in September 2007, Marino did not serve notice of the entry of the default judgment until May 2007, only four months before the defendants filed their motion.

hearing, nor even a copy of the default order itself, is the same as a notice of entry of default.

Courts in other contexts have insisted on literal compliance with rules or statutes governing jurisdictional time limitations triggered by notice of entry of a particular order. (See e.g., *Alan v. American Hodan Motor Co.* (2007) 40 Cal.4th 894, 902 [citing with approval cases holding that "documents mailed by the clerk do not trigger the 60-day period for filing a notice of appeal unless the documents strictly comply with the [Cal. Rule of Court, rule 8.104(a)(1)]"; *Sunset Millennium Assocs., LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 259-260 [14-page minute order with notice of entry language on page 13 does not comply with rule that document providing notice of entry be so entitled]; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 65 [clerk's notice of entry insufficient if it omits indication order has been made by court].) We agree with this reasoning and conclude service of the entered default as an attachment to the default prove-up pleadings did not constitute notice of entry of default as contemplated under section 473.5, subdivision (a)(ii). Accordingly, the two-year period set forth in section 473.5, subdivision (a)(i), applied to the motion for relief filed by Pro Sports and Feller, and the motion was therefore timely filed.

4. *Marino's Request for Attorney Fees Must Be Determined by the Trial Court*

Section 473, subdivision (c)(1), authorizes a court to condition relief from default on payment of a penalty of $1,000 or "[g]rant other relief as is appropriate." In his opposition to the motion for relief filed by Pro Sports and Feller, Marino requested an award of attorney fees in the event relief were granted; but the trial court did not rule on this request. In light of the facts set forth above, an award of fees and costs appears appropriate. However, such a determination should be made by the trial court in the first instance. Marino has preserved the issue and is entitled to renew it upon remand to the trial court.

DISPOSITION

The order granting relief from the default and the default judgment is affirmed. Each party is to bear his or its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.